No. 95-1924

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

JERRAL W. JONES and MICHAEL V. McCOY,

Petitioners,

vs.

BOB KLEIN and GENEVIEVE KLEIN, JOHN FRANK PENDERGRASS, SAM THOMPSON, MARGARET SCHAFFER, CLYMER LAW, DONNIE HALL, ARKOMA PRODUCTION COMPANY, ARKLA, INC. and ARKLA EXPLORATION COMPANY,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS ARKOMA PRODUCTION COMPANY, ARKLA, INC. AND ARKLA EXPLORATION COMPANY

JERRY L. CANFIELD
Counsel of Record
DAILY, WEST, CORE, COFFMAN & CANFIELD, P.L.L.C.
Attorneys for Respondents Arkoma Production Company, Arkla, Inc. and Arkla Exploration Company
P.O. Box 1446
Fort Smith, Arkansas 72902
(501) 782-0361

9095-A
Lutz Appellate Services, inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

PARTIES TO THE PROCEEDING

Petitioners are Jerral W. Jones and Michael V. McCoy ("JM"). One set of Respondents is a class of approximately 3,000 Arkansas oil and gas lessors ("royalty holders") whose claims derive from oil and gas leases held, in part, by Arkoma Production Company ("Arkoma"). Arkoma is a Respondent as are its affiliated entities, Arkla Exploration Company ("AEC"), Arkoma's parent, and Arkla, Inc. ("Arkla"), AEC's parent. Arkoma, Arkla and AEC are Delaware corporations. Arkla is now known as NorAm Energy Corp.

STATEMENT OF THE CASE

Respondent royalty holders brought this diversity action alleging, among other claims now dismissed, an unjust enrichment action against Petitioners, JM, and a breach of implied duty to market against Respondent, Arkoma. The claim against JM proceeded as described in the Petition of JM at pages 2-3. Applying controlling Arkansas law, the District Court determined that the royalty holders' implied covenant to market cause of action against Arkoma was time barred; however, rather than dismissing the cause of action, the Court extended to the royalty holders in a seven day trial the opportunity to establish that the statute of limitation had been tolled by fraudulent concealment or other action. Pet. App. 122a. After the seven day trial, the District Court expressed doubt regarding the merits of the royalty holders' claim, did not make findings regarding the merits, confirmed the determination that the cause of action was time barred and made express findings of fact that there was no fraudulent concealment or other action which would toll the running of the applicable time bar. Arkoma App. 2a-8a. In *Klein I*, the Eighth Circuit reversed the District Court's dismissal of the implied covenant to market cause of action. In doing so, the Eighth Circuit did not mention Federal Rules of Civil Procedure Rule 52(a), did not explicitly apply the clearly erroneous standard to the District Court's findings of fact and offered no explanation for any finding, if the Court was of that view, as to why the District Court's express findings on the time bar clearly were erroneous. *See Dennison Mfg. Co. v. Panduit Corp.*, 475 U.S. 809, 811 (1986). *See* Arkoma's Conditional Cross-Petition filed on this date.

On remand, the District Court[1] reviewed the record of the

1. As the original District Court Judge, Morris Arnold, had been elevated to the Eighth Circuit, the trial on remand was conducted by Judge Jimm Larry Hendren.

seven day trial conducted in 1991 (as the liability issues [2] had been tried fully), issued detailed findings of fact indicating that Arkoma's marketing decisions were prudent and reasonable and dismissed the marketing action on the merits. Pet. App. 25a. In *Klein II*, the Eighth Circuit commented that such findings "may be correct" but astonishingly determined that the reasonableness and prudence[3] of the marketing decisions were not the issue and so defined Arkoma's implied duty to reasonably market gas as including a duty to ensure the royalty holders received a portion of the funds paid by Arkla to JM as consideration[4] for the determined take-or-pay settlement. *Klein II*, Pet. App. at 12a-14a. As JM admittedly received the subject monies, the Eighth Circuit held that the liability to the royalty holders is primary as to JM and secondary as to Arkoma. *Id.*

REASONS FOR DENYING THE WRIT

I.

ARKOMA CONCURS IN PETITIONERS' STATEMENT OF PROCEEDINGS BELOW.

With minor exceptions noted herein,[5] Arkoma concurs in

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2. Damage issues had never been tried by reason of a bifurcation order entered in this matter at the request of the Plaintiff Class. Arkoma App. 1a.

3. Stated to be the "test of compliance" with an implied covenant in *Klein I*, at Pet. App. 104a.

4. Even though the Eighth Circuit acknowledged that none of the monies determined by the Eighth Circuit to be subject to the royalty holders' share flowed through Arkoma but rather were paid by Arkla directly to JM. *Klein II*, at Pet. App. 10a-11a.

5. At JM Petition, page 4, JM notes that, after the 1986 transaction, Arkoma was "indirectly owned by the pipeline Arkla." Arkoma objects. In the (Cont'd)

Petitioners' Statement of the proceedings below. As noted by Petitioners, in reviewing summary judgment granted to both JM and Arkoma on several claims of the royalty holders, *Klein I* "recited the plaintiffs' allegations and assumed them to be true . . ." and *Klein II* accepted the factual recitations of *Klein I* as binding findings not subject to trial by the District Court. *See* JM Petition, p. 3. The described procedure is astonishing.

Arkoma states no position on the argument between the Eighth Circuit (Pet. App. 8a) and Petitioners (Pet., p. 12) as to whether the 1986 transaction should be characterized as a matter of law as including, in part, the settlement of a take-or-pay claim. It seems obvious, and as to damages it is more than clear, that the transaction involved more than just a take-or-pay settlement. Many damage determinations turn on what portions of the transaction consideration relate to the take-or-pay settlement (in which the Eighth Circuit has determined royalty holders share) or to other transaction features (*i.e.*, sale of reserves or contract problems other than take-or-pay as to which royalty holders do

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(Cont'd)

1986 transaction the stock of Arkoma was purchased by AEC, a gas production company owned by Arkla. Both AEC and Arkoma were then gas production companies owned by Arkla. That ownership implies no misdeed. Affiliated relationships between pipelines and gas production companies are common, and pipeline companies are regulated to prevent non-market arrangements with affiliated production companies. In fact, AEC (Arkla's production subsidiary prior to AEC's purchase of the stock of Arkoma) was, with Arkoma, a co-lessee of the royalty holders. AEC had, prior to 1986, settled its take-or-pay claims with Arkla and AEC has not been sued by plaintiffs for the marketing actions of AEC vis-a-vis AEC's co-ownership of the very leases in question. Secondly, JM at page 5 of its Petition states that the District Court, prior to *Klein I*, "held a bench trial ... on certain other *claims* against Arkoma, AEC and Arkla . . . ." Emphasis supplied. In fact, summary judgment was granted to Arkoma, AEC and Arkla on all claims except the implied marketing claim. Only that one claim was tried during the bench trial and only that one claim survives.

not share). To the extent *Klein I* and *Klein II* have determined damage issues based on the *Klein I* recitation of plaintiffs' allegations as fact,[6] *Klein II* both is clearly wrong and is derived by a procedure so far departing from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's supervisory power. This is especially true of *Klein II*'s adoption of the *Klein I* recitation that the subject mineral reserves had a fair market value of $.83 per mcf. How could there be a more fact specific determination which requires trial and district court fact finding?

II.

PETITIONERS' REFERENCE TO THEIR PRIMARY LIABILITY OBLIGATION PROVIDES NO BASIS FOR GRANT OF CERTIORARI.

As noted in Section I above, Arkoma takes no position as to whether the determination, that the 1986 transaction included a take-or-pay settlement, should be characterized as fact or law. Arkoma does concur with JM that any damage determinations must be factual, and *Klein II* departs from accepted judicial procedure in making factual damage determinations, especially as the damage issues have not yet been tried.

JM's Petition departs from "logic," however, when JM objects to the Eighth Circuit's determination that, as JM received the subject monies, JM has the primary liability to the royalty holders. As to JM's other objections, JM correctly points out that

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6. On remand from *Klein II*, the royalty holders have taken the position that the Eighth Circuit's opinions bind the District Court to damage calculations based on the $.83 per mcf value of reserves recited from Plaintiffs' allegations and to the assumption that the royalty holders share in transaction considerations with no trial to determine which considerations relate to contract problems other than take-or-pay.

JM were not parties to the 1991 seven day trial which involved only the royalty holders and Arkoma. However, the "primary" liability determination did not come from *Klein I* (following the 1991 seven day trial); rather, the "primary liability" determination was made in *Klein II* following a full trial of the merits of the unjust enrichment claim against JM. The one fact never disputed - the one fact which rises to the level of a de facto stipulation - is that all of the transaction consideration flowed to JM and not Arkoma. Therefore, the Eighth Circuit's determination of "primary liability" cannot logically be attacked by the same "substantial deviation from accepted judicial proceedings" argument as can *Klein II*'s determination of issues based on *Klein I*'s recitation of plaintiffs' allegations and of damage issues bifurcated and never tried.

Respectfully submitted,

JERRY LEE CANFIELD
Counsel of Record
DAILY, WEST, CORE, COFFMAN
& CANFIELD, P.L.L.C.
Attorneys for Respondents,
Arkoma Production Company,
Arkla, Inc. and
Arkla Exploration Company
P. O. Box 1446
Fort Smith, AR 72902
(501) 782-0361